

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, *et al.*,
Plaintiffs,

vs.

RICK PERRY, *et al.*,
Defendants.

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Civil Action No. 2:03-CV-354

**TRAVIS COUNTY AND THE CITY OF AUSTIN'S
AMENDED RESPONSE BRIEF ON REMEDY**

Travis County and the City of Austin respond as follows to the submissions on remedy. (*This amended brief corrects mis-numbered plans and the County map date.*)

I. FOUR AREAS OF CONSENSUS ON REMEDY

The opening submissions on remedy reflect a consensus – indeed, near-unanimity – on several key points. First, Plan 1374C's District 23 must be redrawn, with almost every party in agreement that Webb County should be reunited in one district. Second, Plan 1374C's District 25 also must be redrawn and made compact. Third, there should be six Latino opportunity districts in South and West Texas in any remedial map, with Districts 16 (El Paso) and 27 (southern Gulf Coast) left untouched.¹ Fourth, a remedy should be put in place for the upcoming round of congressional elections, with party primary results set aside in favor of new elections in districts whose lines are adjusted in the remap remedy. Travis County and Austin join in the consensus on these points.

¹ District 29, a Latino opportunity district in Harris County, also would be left untouched.

II. PLANS 1413C AND 1414C OF THE CITY AND COUNTY FIT MORE COMFORTABLY WITHIN THE *LULAC v. PERRY* RULING AND THE POLICY PREFERENCES AS EXPRESSED BY THE TEXAS HOUSE AND SENATE THAN ANY OTHER PROPOSED PLANS.

The parties substantially part ways over the area of key concern to Travis County and Austin. Where a redrawn District 25 should be, how compact it should be, and what should happen in other districts impinging on the City and Travis County are central features of remaining differences.

Significantly, the City of Austin now has joined with Travis County in proposing Plans 1413C and 1414C as models for a remedial map.² Those alternative maps create what is inarguably a compact district – District 25 – in Austin, Travis County, and the Central Texas area; the redrawn district’s boundaries include more than two-thirds of the City and County population. There are critical differences between the City and County’s proposed District 25 and the other proposed substitutes for the non-compact one in Plan 1374C.

Compactness. Converting District 25 to a compact district is essential if a remedial plan is to ensure that it satisfies the Supreme Court’s June 28th ruling in *LULAC v. Perry*. Moreover, the Supreme Court’s decision provides new guidance on compactness. Under that decision, compactness embraces not only shape, but geography and the relation of people in the far reaches of a district. The current District 25 was

² The Austin City Council, in a special called session on July 19th, voted unanimously (6-0) to endorse the remedial map proffered on July 14th by the County (whose Commissioners Court had previously voted 4-1 in support of the map). (Austin’s Mayor was absent at the time of the vote, but, in a statement read into the record, he individually indicated his opposition to the map submitted by the Texas Attorney General, and his support for the principle that a majority of the voters in a district encompassing Austin should be Austin residents. That principle is reflected in the action ultimately taken by the rest of the council.) The City Council’s resolution further indicated opposition to any remedial plan that leaves less than two-thirds of Austin’s population in any single congressional district. Since Austin’s 2000 census population is 644,752 (only seven thousand people short of the ideal congressional district population), that means that Austin’s governing body urges that any remedial plan include a district in the city with at least 429,856 people in it.

adjudged non-compact not only because it stretched a long distance, but also because it linked two distinct communities of interest at either end.

The proffered City and County plans are the ones that most clearly and obviously satisfy the compactness criteria of *LULAC v. Perry* as to a reconfigured District 25. The City and County's District 25 is not only regular in shape; it is geographically centralized and linked. It covers only four counties, with Travis County at the hub. In fact, each of the other three counties shares a county line with Travis County. The entire district lies in a single media market in Central Texas. Moreover, in terms of important municipal relations with the federal government, having the entire district located in the Central Texas area can aid the City in having a focused congressional interest.³

Other proposed maps lie along a continuum between relative compactness to relative non-compactness. The important point is that *none* of them is as geographically compact as the City and County's proposed District 25.

The other aspect of compactness that must be evaluated in light of *LULAC v. Perry* concerns the disparate communities of people in the district. Unlike the City and County proposals, most of the other remedy proposals display substantially less compactness in this respect, too. Certainly, none is as compact in this respect as the City and County proposals.

³ One Austin council member, Jennifer Kim, highlighted the importance of this fact in her public comments at the July 19th council session endorsing the County's proposed map. Austin is experiencing significant growth and is becoming part of a regional Central Texas economy with interdependent communities in the immediate surrounding area. In crucial matters of transportation (commuter rail, for example) and economic development coupled with sustainable growth (the Envision Central Texas planning initiative, for example), relations with the federal government are key, and, for an urbanized area as large as Austin, Travis County, and Central Texas, those relations virtually demand at least one congressional representative whose district – and, therefore, whose concerns – covers a substantial portion of the area of concern. This can only be achieved by having one district solidly anchored in Travis County and the City of Austin.

The map proposed by state officials is among the most adventurous in this regard. In terms of districts touching on the City and County, it is wildly non-compact in terms of communities of people. It moves District 25 entirely out of Travis County, but only a few miles down the road to the Caldwell County line in Central Texas. This district is still anchored at the Rio Grande in the south and stretches just short of 300 miles. The state officials' District 21 can hardly be said to be comfortably within the compactness rule of *LULAC v. Perry* in terms of people's communities of interest. It links a largely minority population in eastern Travis County and Austin with suburban San Antonio in Bexar County. The state officials' District 23 then links much of the rest of Austin and Travis County with both northern suburbs of San Antonio in Bexar County and comparatively distant, non-urbanized Hill Country counties.

Other maps, too, threaten to test the limits of the "people" compactness element of *LULAC v. Perry*. Several – for example, MALDEF's and the Bipartisan Congressional Compromise – again link disparate communities of people in eastern Travis County and Austin with Bexar County and San Antonio communities.

The point here is that there is no reason to test the limits of the compactness doctrine announced in *LULAC v. Perry*. The City and County's proposal undoubtedly lies inside those limits. Others undoubtedly lie outside it. And, still others ask the Court to push those limits to see where the breaking point is. A remedial map should not be that venturesome.

Number of districts affected. The number of districts affected by the various proposed remedies vary from four to six. The City and the County's proposals affect six.

They certainly will be challenged on this ground, with the argument that they go beyond the constraints of federal court remedial powers. Such arguments are erroneous.

The number of districts that might be affected is a factor to consider. Gratuitously affecting more districts than necessary to remedy the legal violation should be, and is, off limits to a federal court devising a remedial decree. But, when the additional, affected districts exist in their current configurations only *because of the violation*, it is perfectly appropriate to reach them. It is in this respect that the City and County's remedial proposals differ from all the others. The two additional districts affected by what the City and County propose as a remedy exist in their current form only because of the District 23 violation and the failure of the District 25 substitute. Furthermore, the suggested changes to these two affected districts – Districts 10 and 15 – are focused on ameliorating the distortions in them that flowed from the legal violations found by the Supreme Court.

In this regard, it is critical for the Court to follow the trail of what happened in Austin and Travis County. Three times, in the three separate special sessions, the Texas House passed a plan that maintained a district – former District 10 under Plan 1151C from 2001 – wholly within Travis County, covering 85% or so of Austin. *See, e.g.*, Plan 1268C (passed House, Sept. 17, 2003). The Texas Senate passed a plan doing the same thing: maintaining a compact district entirely within Travis County. *See* Plan 1353C, as amended by Plans 1354C and 1356C (passed Senate, Sept. 19, 2003). Not only did these House- and Senate-passed plans reflect a policy to maintain a district anchored in Austin and Travis County, they also added no additional district (such as the current District 10) in Travis County and Austin and kept District 15 below Interstate Highway 10, oriented to South Texas and its Hidalgo County base.

It is only when the final plan came out, embodying the decision to split Webb County to protect Congressman Bonilla and create District 25 to try to compensate and “replace” District 23, that the nature of the Austin and Travis County district changed (with District 10’s new encroachment), and it was only then that District 15 was extended northward into Central Texas. This northward squeeze, which also pushed District 28 northward to the Travis-Hays County line, was the direct, planned result of what was done with Districts 23 and 25. This was the trial testimony of Bob Davis, the Senate’s chief map drawer. He explained that District 15 “extends further northward to accommodate the population loss that it has in the southern portion, principally Hidalgo County which was transferred to the new Hispanic District, District 25.” Testimony of B. Davis, 12/18/03, 8:30 a.m. session, at 109. He also explained that the first explanation of District 10’s Plan 1374C configuration was “the decision to draw an additional Hispanic District that goes from The Valley up into Travis County which takes a significant portion of the current District 10 and includes it into the new Congressional District 25[.] ...[S]o the residual portions of Travis County that were not in 25 were split between District 21 and 10[.] ... So that’s how District 10 came into be.” Testimony of B. Davis, 12/18/03, 8:30 a.m. session, at 107.

None of the other plans takes these undisputed facts into account in their proposed remedies. Only the City of Austin and Travis County’s proposals do. When the bills that passed the House and Senate without squeezing District 25 into the map as a substitute for District 23 are contrasted with what happened to the Travis County area when the District 25 squeeze was tried in Plan 1374C, the policy of the State House and Senate is plain: Travis County and Austin remain the strong anchor of a district; District 10 does

not encroach into Travis County; and District 15 keeps its South Texas/Hidalgo County orientation instead of being pushed into Bastrop County. Indeed, the plans offered by the City of Austin and Travis County are the only plans that effectively adjust the “bacon strip” districts referred to in Judge Ward’s dissent in 2003, 298 F.Supp.2d at 528, leaving virtually no Central Texas population north of Interstate 10 in these South Texas districts. Since Districts 23 and 25 under Plan 1374C now must be completely reconfigured, the only way to honor the expressed policies of the state would be to devise a remedial plan substantially along the line of the six-district repair proposed by the City and the County. Otherwise, the Court would be leaving in place direct outgrowths of the now-invalidated policy choices the legislature made.

The other remedial plans proposing to modify four districts, by omitting repairs to Districts 10 and 15, leave in place the direct results of invalidated policies. The other remedial plans proposing to modify five or six districts fail to tailor their proposed remedial machinations to the aspects of those additional districts that resulted from the invalid policy choices, plus, typically, they fail to reinstate a district solidly anchored – with at least 430,000 or so people in Austin – in the County and the City. None, therefore, is tailored to the violation that has been found to the degree the City and County proposals are tailored.

The remedial task in this case is very much like the one addressed in *Abrams v. Johnson*, 521 U.S. 74 (1997). There, after emphasizing that the finding that there had been an over-extended remedy in *Upham v. Seamon*, 456 U.S. 37 (1982), arose from the fact that the district court there had changed “unrelated districts,” the Court explained that, when a large geographic area of the state was affected by the unconstitutional

redistricting actions, any remedy perforce would affect most of the districts in that area. *Abrams*, 521 U.S. at 85-86. The remedy that the City and County seek does not touch “unrelated districts.” It only touches those districts in the broad swath of the state affected by the illegal legislative actions, and it only seeks to return those districts to configurations approximating the ones they were given by the legislature itself, except for the imposition of the illegal acts.⁴

Consistency with the Voting Rights Act. Trial testimony from experienced elected public officials in the Austin and Travis County area highlighted the uniqueness of Austin and Travis County in a special sphere of concern under the Voting Rights Act.⁵ Unlike many other areas in Texas and elsewhere covered by Section 5 of the Voting Rights Act, the Capital City has, and has had for some time, a true tri-ethnic voting coalition, with African-Americans, Latinos, and Anglos all engaged in a difficult, but mutual, pulling and hauling to achieve common electoral ground and objectives.⁶ This distinguishes the Travis County/Austin situation from those in other areas in which some have questioned whether there is indeed a fair presumption of a coalition between Hispanic and African-American voters in the context of Section 2 analysis under the

⁴ Stated another way, for this Court to honor the “legislative judgments the plans reflect,” *Upham*, 456 U.S. at 40-41, it should return the district configurations to a reasonable approximation of the way they would have been but for the illegal actions of the legislature. That means that District 10 and District 15 should be altered as proposed by the City and County.

⁵ Travis County Judge Biscoe and County Commissioner Gomez are two examples of those witnesses who provided such testimony.

⁶ See, e.g., *LULAC v. Clements*, 999 F.2d 831, 888 (5th Cir. 1992), *cert. denied*, 510 U.S. 1071 (1994) (concluding in a challenge to at-large judicial elections that “the undisputed facts indicate that Travis County’s political system is open to Hispanic and white candidates alike”); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (“Austin has repeatedly elected Black and Mexican-American council members. ... Minority candidates have routinely been elected to other posts in Austin and the surrounding Travis County”).

Voting Rights Act. *See, e.g., Campos v. City of Baytown*, 849 F.2d 943 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc).

The importance of the tri-ethnic coalition's effectiveness should not be minimized when addressing the question of how compact to make a re-worked District 25. The Voting Rights Act's aspiration is to move toward precisely the kind of voting patterns that have repeatedly been determined to exist in the Austin/Travis County area. Any remedy for District 25 would be a disservice to the objectives of the very statute whose violation is to be remedied if the remedy failed to try to achieve at least a partial restoration of the tri-ethnic coalition in this area.

The City and County's proposals are the closest of the proposals to a meaningful restoration of this Voting Rights Act objective. Others take steps in that direction. The Jackson Plaintiffs' map, for example, moves significantly that way. The map of the Texas Coalition of Black Democrats does to some degree, too.

The state's map, on the other hand, shows contempt for the very concept of achieving such a meaningful coalition. It splinters the minority community of Austin and Travis County into several pieces, then ensures that even those splinters have no electoral voice by submerging them in overwhelmingly Anglo districts whose candidate preferences are diametrically opposed to those historically demonstrated by minority voters in the area.

The City and County's map, though, restores the coalition to a significant degree by adding population in North, Central, and Northeast Austin to the core of District 25. It reunites scattered pieces of the African-American community from their isolation under Plan 1374C.

In short, beyond the City and County's proposal, none of the other plans more safely brings a remedial proposal within the boundaries set in the *LULAC v. Perry* decision. The compactness requirement is most plainly satisfied in Plans 1413C and 1414C. The expressed state legislative policies – with the offending pieces of Districts 23 and 25 removed – are most closely adhered to in the City and County proposals. The Voting Rights Act violations are remedied, and the objectives of the Voting Rights Act are achieved, in a better tailored way than in any other proposal. Communities of interest across South and West Texas are more closely served. (For example, San Antonio and Bexar County are not further divided into a fifth district.)

III. THE STATE OFFICIALS' PLAN IS TOO WIDELY FLAWED TO SERVE AS ANY GUIDE WHATEVER FOR A REMEDIAL PLAN.

As one of Austin's council members remarked⁷ in the July 19th session leading to endorsement of the County's proposed remedial map, the state officials' proposed remedial plan gives a whole new meaning to the phrase "Keep Austin Weird." As discussed in Part II, above, this plan is a calculated effort to avoid restoration of any remnant of the tri-ethnic coalition that historically has served Austin and Travis County so well. It utterly disregards the Austin/Travis County configuration that the House and Senate formally adopted in passing bills without the offending District 23 and the non-compensatory District 25. Its reconfiguration of District 25, moving its northern end only a few miles south, to the Travis County line with Caldwell County, is hardly a bold step toward remedying the non-compactness problem there. It is, effectively, an invitation to this Court to thumb its nose at the Supreme Court's ruling.

⁷ Brewster McCracken was the member making this observation.

But, the state officials' plan is bold in one regard. It proposes a transparent partisan gerrymander as a remedial plan, designed to further dismember Austin, Travis County, and the tri-ethnic coalition that has been constructed there over the years, in order to ensure that this community's political preferences have no chance whatever of finding expression at the polls for congressional candidates. While the Supreme Court may have established a rule in *LULAC v. Perry* that cautions against federal court interference with openly partisan *legislative* choices, the developing jurisprudence in this area can hardly be converted into a suggestion that federal courts actively intrude into the process in order to help others achieve openly partisan objectives. This Court refused to do so when it faced a somewhat more open situation in 2001 as it developed the *Balderas* plan. It should refuse to do so again, firmly rejecting the state officials' brazen invitation.

The state officials' plan would move more than 435,000 Austin residents into new districts. (Only those in District 10 would be undisturbed.) Furthermore, the reality is that it pairs two incumbents – Congressmen Smith and Doggett – in the proposed new District 21.⁸ Indeed, the state officials' plan is so excessively disruptive that far more people would be moved into new districts in their proposed four-district remedy than are moved into new districts in the City and County proposal that affects six districts.

Further afield from the most direct concerns of the City and County, the state officials' proposal further splits Bexar County, adding a fifth district in the area. In addition to its questionable continued elongation of District 25 to the edge of Travis County, it does not even restore its replacement district for current District 23 to the

⁸ The remedy brief somewhat disingenuously notes that Congressman Doggett resides in District 10 "according to the RedAppl database." State Defendants' Remedy Br. at 13. Congressman Doggett is well known to reside in District 25, his current district. The two year lag in RedAppl's updating on the residence matter simply has not caught up to this fact.

63.0% Hispanic Voting Age Population level it had just before the illegal split of Webb County in Plan 1374C.

CONCLUSION

The proposed remedies lie along a continuum of viability under the *LULAC v. Perry* decision. The County and City proposals lie most securely within the confines of that ruling, most particularly on the core concern of compactness for a newly configured District 25. The state officials' proposed remedy falls at the far end of the spectrum, outside the realm of reasonable remedial plans. It cuts everything – compactness of District 25, restoration of a viable Voting Rights Act district centered in Webb County – too close to the bone, ultimately adopting an overly cramped reading of *LULAC v. Perry*. Worst of all, it invites this Court to actively participate in a blatantly partisan gerrymander in Central Texas, in the very same case in which it has successfully urged the Supreme Court that federal courts are to take a very passive, hands-off approach to such questionable actions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **TRAVIS COUNTY AND THE CITY OF AUSTIN'S AMENDED RESPONSE BRIEF ON REMEDY** was forwarded by electronic delivery on this 21ST day of July, 2006, to each of the following counsel:

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